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Supreme Court, U.S.
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No.__

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM,1995

Tasker Generes, Petitioner

v.

Patricia Morrell and Edward L. Morrell, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 5, 1996

43 pp

QUESTIONS PRESENTED

I. Whether sanctions under Fed. R. App. P. 38 violates the holding of this Court in *McKnight v General Motors Corp.*, 114 S.Ct. 1826, 1826 (1994) and the Rules Enabling Act, 28 U.S.C. §2072(b) and the right to appeal under 28 U.S.C. §1291 where the Seventh Circuit sanctioned the plaintiff, personally, but imposed no fees on appellate counsel, for bringing a frivolous appeal where the case raised an issue of first impression in the Seventh Circuit..

II. Whether the Seventh Circuit's holding that there is no right to closing argument in all civil cases is contrary to prior Supreme Court precedent that the issue of the right to oral argument in a civil case must be decided on a case by case basis..

III. a). Does a District Court have subject matter jurisdiction in a Bankruptcy Appeal to impose a Rule 11 sanction? The Seventh Circuit's holding in this case is in conflict with *in re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987). If so, is a District Court's order entered in 1994 on a 1994 Rule 11 motion for sanctions governed by 1993 amended Rule 11? The Seventh Circuit held old Rule 11 applied and reversed the imposition of no fees under Rule 11 and remanded.

b). Whether an adverse credibility finding by a Bankruptcy judge constitutes a finding of perjury upon which a District Court sitting as an Appellate Court can impose sanctions under its inherent authority for bad faith trial conduct notwithstanding that the trial court that observed the witnesses entered no sanctions and in fact ruled that each party shall bear its own costs - implicitly making a factual finding that Tasker Generes was not litigating in bad faith.

c) Whether the 1993 confirmed plan of reorganization deprived the subsequent adversary proceeding of core matter jurisdiction rendering all subsequent proceedings without jurisdiction.

PARTY LIST

Tasker O de Generes

Edward L. Morrell
Patricia Morrell.

The parties are individuals.

TABLE OF CONTENT & AUTHORITIES

	Page
QUESTION PRESENTED	i
PARTY LIST	ii
TABLE OF CONTENTS AND AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	
I. Background	
II. The Generes Appeal to the Seventh Circuit	3
III. The Morrells Cross-appeal to the Seventh Circuit of the District Court's denial of additional sanctions in the form of attorney fees.	5
IV. The Morrells Cross-appeal to the District Court of the Decision of the Bankruptcy Court.	5
V. The Adversary Proceedings in Bankruptcy Court	6
VI. Basis of Jurisdiction Below	8
REASONS FOR GRANTING THE PETITION	
I. Introduction	11
II. Seventh Circuit's Broadened Application of Circuit Rule 38 and New *per se* Frivolous Appeal Rule against Appeals of Any Factual Findings Chills Advocacy and Conflicts with Established Law.	13
III. Seventh Circuit's No Closing Argument Right Holding is Contrary to Supreme Court and Highest State Court Precedent.	19
IV. This Court Needs to Resolve the Conflict over When It is Unjust to Apply an Old Rule of Civil Procedure After Amendment for Remedial Reason	23

by the Legislature For Cases Pending before Amendment.

V. Imposition of Sanctions against Witnesses Not Believed By a Judge and Condemning Them as Perjurers Without Indictment Interferes with the American Justice System 26

VI. No Core Subject Matter Jurisdiction 29

SUMMARY 30

CONCLUSION 30

APPENDIX

Order on Petition for Rehearing in 7th. Cir. 31

Order on Rule 38 in 7th Cir. 31

SEPARATELY BOUND APPENDIXES

A. I. In Re Generes. 69 F.3d 821 (7th Cir. 1995) 1

II. In Re Generes, 165 B.R. 1011 (N.D.ILL.1994) 13

III. Bankruptcy Court's Orders on New Trial Motion. 32

IV. Motion for a New Trial 34

B. I. Final Order in Adversary Case 92 A 01283 1

II. Trial Transcript in Generes v Morrell 3

Opening Statement by Mr. Sandack, Esq. 5

Opening Statement by Mr. King, Esq. 6

Direct Examination of Tasker Generes 9

Cross Examination of Tasker Generes 16

Redirect Examination of Tasker Generes 40

Direct Examination of James G. Sondini 41

Cross Examination of James G. Sondini 42

Direct Examination of Edward L. Morrell 43

Cross Examination of Edward L. Morrell 52
Redirect Examination of Edward L. Morrell 55
Recross Examination of Edward L. Morrell 55
Direct Examination of Patricia Morrell 61
Cross Examination of Patricia Morrell 62
Redirect Examination of Patricia Morrell 62
FINDINGS OF FACT and CONCLUSIONS OF LAW 62

C. I. ADVERSARY COMPLAINT & ANSWER 1
II. Exhibit A Residential Lease for 1829 Happ Rd 8
Exhibit B July 1, 1991 Letter re Holdover 17
Exhibit C Damage List 18
III. Morrell Rent Check Dated July 6, 1991 20
IV. Docket Statements
Bankruptcy Court Proceedings 21
District Court Proceedings 27
Appellate Court Generes' Appeal 32
Appellate Court Morrell's Appeal 43
V. Text of Constitution, Statutes, and Rules
U.S. Const Amendment 5 54
28 USC 1291 55
28 USC 2072 et seq 55
Fed R App P Rule 38 57
Fed R. Civ. P. Rule 1 58
Fed R. Civ. P. Rule 11 per Dec 1, 1993 58
Fed R. Civ. P. Rule 11 post Dec 1, 1993 60
Rule 52 61
Rule 54 62
Bankruptcy Adversary Proc Rules:
7,001 63
7,052 63
7,054 63

Bankruptcy Rules for Appeals to District Court
8,013 64
8,014 64
8018(b) 64
Bankruptcy Rules General
Rule 9011 65
D. I. Confirmation Order with Reorganization Plan 1
II. Generes' Attorney's Time Records 9
III. Morrells' Attorney's Time Records 14
IV. 7th Cir. Petition for Rehearing 22

CASES

Aladdin Oil Burner Corp. v. Morton, 187 A. 350 (N.J.Sup. 1936), 117 N.J.L. 260 20
Alyeska Pipeline and Service Co. v. Wilderness Society, 421 U.S. 240, 247, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). 27
Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974). 24
Brown v. National Board of Medical Examiners, 800 F.2d 168 (7th Cir. 1986). 11
Budinich v. Becton Dickinson & Co., 486 U.S. 196(1988 9
Burt v. Ware, 14 F.3d 256, 259 (5th Cir. 1994): 22
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 25
Chambers *v. NASCO, Inc.* 501 U.S. 32, 111 S.Ct. 2123, 115 L. ed. 2d 27 (1991) 24
Cleveland v. Porca Co., 28 F.3d 289 (7th Cir. 1994). 23
Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 277(1949) 15
DeGurules v. INS, 833 F.2d 861, 862-863 (CA9. 1987). 23
Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1945 (1994) 27
Diaz v. Shallbetter, 989 F.2d 850, 853 (7th Cir. 1993) 23
Disher v. Information Resources, Inc., 873 F.2d 136, 139 (7th Cir. 1989).
..... 13
Donohoe v. Consolidated Operating and Prod., 139 F.R.D. 626, 634 (N.D.Ill. 1991) 15
Elliott v. Tilton, 64 F .3d 213 (5th Cir.1995) *5, 25*
Erickson v. Walsh, 11 Ill.App.3d 99, 296 NE.2d 36 24
Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 277 (1949) 19
Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 277 (1949), ... 14
Flaherty v. Gas Research Inst., 31 F.3d 451, 459 (7th Cir. 1994) .. 17
Freund v. Fleetwood Enterprises, Inc., 956 F.2d 354, 363 (1st Cir. 1992). 22
Fuhrman v. Fuhrman, 354 N.W.2d 97 21
Goldstein v. Lustig, 154 Ill. App. 3d 595, 507 N.E2d 164, 168 (1987) 16

Gray v. Lacke, 885 F.2d 399, 406 (7th Cir. 1989. *cert denied* 494 U.S. 1029 (1990) 13
Hagge v. Bauer, 827 F.2d 101, 110 (7th Cir 1987). 14
Herring v. New York, 422 U.S. 853, 863, 95 S.Ct. 2550, 2556, 45 L.Ed.2d 593 601 (1975): 21
Hill v. Norfolk & Western Ry. 814 F.2d 1192, 1200 (7th Cir. 1987) . 19
Hovey v. Elliot, 167 U.S. 409, 42L.Ed 215, 220-21, 17 S.Ct 841 (1987) 19
In Re Akros Installations, Inc., 834 F.2d 1526, 1531 (9th Cir. 1987) 25
In re Aviva Gelato, Inc. (9th Cir. BAP 1988), 94 B.R. 622, 624, aff'd (9th Cir 1991), 930 F.2d 26 4
In re Coast Pacing Material Co. (Bankr. S.D. Cal. 1989, 109 B.R. 410, 412 4
In re Consolidate Partners Invest. Co. (Bankr. N.D. Ohio 1993), 156 B.R. 982 4
In re Crystal Manufacturing, 60 Bankr. 818, 820 (N.D. Ill., 1986) .. 29
In re Dunston (D.Colo. 1992), 146 B.R. 269, 276 4
In re Gioioso (3d Cir. 1992), 979 F.2d 956 4
In re Grynberg (10th Cir. 1992), 966 F.2d 570, 573 4
In re Hagan (Bankr. D.R.I. 1984), 44 B.R. 59, 64 4
In re Investment Bankers, Inc. (Bankr. D.Colo. 1991), 135 B.R. 659, 670-71 4
In re Kamakani Services, 125 Bankr. 819, 819-820 (Bankr. D. Hawaii, 1991) 26
In re Keller (Bankr. N.D.N.Y. 1989), 125 BR. 716, 719 4
In re National Marine Sales & Leasing, Inc. (Bankr. W.D.Mo. 1987), 79 B.R. 442, 460 4
In re NTG Industries, 118 Bankr. 606 (W.D Wis 1986) 29
In re Robertson (Bankr. D. Minn. 1989), 105 B.R. 504, 507 4
In re Roco Corp. (Bankr. D.R.I. 1984), 37 B.R. 770, 775 4
In re Xonics, 813 F. 2d 127, 131 (7th Cir. 1987) 29
Jackson v. Consolidated Rail Corp., 717 F. 2d 1045, 1055 (7th Cir, 1983), cert denied, 465 U.S. 1007 (1984) 29
Kizer v. Childrens' Learing Center, 962 F. 2d 608, 613 (7th Cir. 1992) 18
Knipe v. Skinner 19 F.3d 725 62 USLW 2670, 28 Fed.R.Serv.3d 420 (2nd. Cir. (R.I), 1994)). 24
Korbelik v. Stashke, 232 Ill.App.3d 114, 173 Ill.Dec. 181, 184, 596 N.E.2d 805, 808 (1992) 22

Landgraf v. USI Fil Products et al, 114 S.Ct. 1433 (1994). 12
Landgraf v. USI Film Products et. al , 114 S.Ct 1483; 128 L. Ed. 2d 229; 62 U.S.L.W. 4255 24
LaVigna v. WABC Television, Inc., 159 F.R.D. 432, 436 (SDNY, 1995)
Londoner v. City of Denver (1908) 210 U.S. 373 6
Morgan v. United States (1936) 298 U.S. 468. 19
Marquardt v. North Am. Car Corp., 652 F.2d 714, 716 (7th Cir. 1981)15
Matter of Generes, 165 B.R. 1011, 1021 (N.D.ILL. 1994); 6
Matter of Generes, 69 F.3d 821(7th Cir. 1995) 23
Matter of Generes, 69 F.3d 821, 825. (7th. Cir. 1995). 7
Matter of Generes, 69 F.3d 821, 826 (7th Cir. 1995). 6
Matter of Generes, 69 F.3d 821, 828 (7th. Cir. 1995). 12
McKnight v. General Motors Corp., 114 S.Ct. 1826, 1826 (1994) .. 15
Memphis Light, Gas & Water Div. v. Craft (1978), 436 U.S. 1, 16 n.176. 18
Meredith v. Navistar Int'l Transp. Co., 935 F.2d 124, 128-29 (7th Cir. 1991). 14
Meridith v. Navistar Int'l Transp. Co., 935 F.2d 124, 128-29 (7th Cir. 1991) 15
Molaire v. Smith (S.D. Fla. 1990), 743 F.Supp. 839, 845 6
Morristown Daily Record v. Graphic Comm. Local 8N, 832 F.2d 31, 32n.1 (3rd. Cir. 1987). 24
N.L.R.B. v. Lucy Ellen Candy Div., 517 F.2d 551, 555 (7th Cir. 1975) 14
Northwestern Nat'l Ins. Co. v. Baltes, 15 F.3d 660, 664 (7th Cir. 1994) 16
Northern Pipline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 30
Osterneck v. Ernst & Whinney, 489 U.S. 169, 174 (1989) 10
Pony Express Courier v. Pony Express Deliver, 872 F.2d 217, 319 (9th Cir. 1989) 18
Professional Programs Group v. Department of Commerce, 29 F.3d 1349 (9th Cir. 1994) 23
Railway Passengers & Freight Conductors' Mutual Aid & Benefit Association v. Robinson (1893) 147 Ill 138, 159-60, 35 NE 168, 176 22
Richa v. Wichita Precision Tool Company, 373 P.2d 201, 204-206 (1962), 190 Kan. 138 (1962). 20
Rodgers v. Wood, 910 F.2d 444, 449 (7th Cir. 1990) 15
Rodrigues-Gutierrez v. INS, 59 F. 3d 504-508 (5th Cir. 1995): 27

Sauers v. Commissoner of Internal Revenue, 77 1 F.2d 64, 70 n. 9 (3d Cir. 1984) cer denied 475 U.S. 1162, 90 L. Ed. 2d 727, 106 S. Ct. 2286 (1986) 11
Scheidler v. National Organization for Women, Inc., 739 F. Supp 1210, 1215-17 (ND Ill. 1990) 28
Skoczylas v. Federal Bureau of Prisons, 961 F.2d 543, 546 (5th Cir. 1992). 24
Theodorou v. Community Builders, Inc., 6 Ill.App.3d 277, 285 N.E. 474 24
United States v. Chambers, 291 U.S. 217, 223-224 (1934). 23
Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 842 (1st Cir. 1990) . 17
Weiss v. Coca-Cola Bottling., 990 F.2d 333, 335 n.2 (7th Cir. 1993) 16
West Chicago Park Comrs. v. Riddle (1909) 151 Ill App 487, *affd* 245 Ill 168, 91 NE 1060 22
Wilson v. City of Atlantic City, 142 F.R.D. 603, 605 (D.N.J. 1992) . 24

STATUTES

146 F.R.D. 404 (April 22, 1993)(..... 23

28 U.S.C. §1254(1). 1
28 U.S.C. §1291 13
28 U.S.C. §2072(b). 13
28 USC § 1821 25

RULES

amended Rule 11 ..... 5, 11, 21

Fed. R. Civ. P. 54(d) 4
Fed. R. Civ. P. 54(d). 4
Rule 11 ..... 3, 4
Rule 38 ..... 3, 5, 12, 13

CONSTITUTIONAL PROVISIONS

5th Amendment 14

BANKRUPTCY RULES

Bankruptcy Adversary Rule7008(b) 4

Bankruptcy Adversary Rule 7054(b) 4
Bankruptcy Rule 7054(b). 26
Bankruptcy Rule 8013 3
Bankruptcy Rule 9011 ..... 2, 5

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

Tasker Generes, Petitioners

v.

Patricia Morrell and Edward L. Morrell, Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Tasker Generes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

1. Unreported Order rehearing denied on March 21, 1996;
2. Unreported Rule 38 Order without opinion February 21, 1996;
3. Matter of Generes, 69 F.3d 821 (7th Cir. 1995);
4. Matter of Generes, 165 B.R. 1011 (N.D..ILL. 1994);
5. In Re: Tasker Generes and Dorothy Generes, Joint Debtors Tasker Generes, Plaintiff, v. Edward L. Morrell and Patricia Morrell, Defendants Adv. No. 92 A 01283, Judge Coar, United States Bankruptcy Court For the Northern District of Illinois Eastern Division EOD July 15, 1993. The opinion and order are unreported. (See Appendix "A" to this Petition).
6. Unreported order confiming plan of reorganization June 30, 1993, *In re Generes*, 91 B 17220, Chapter 11, Judge Coar.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals entered its judgment on February 21, 1996. On March 6, 1996 a petition for Rehearing and Suggestion for Rehearing In Banc was filed. It was denied on March 21, 1996. There have been no motions for extension of time to file a petition for a writ of certiorari.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE.

1 United States Constitution, Amendment No. 5

2 28 U.S.C. §1291

3 Rules Enabling Act, 28 U.S.C. §2072(b), §2074(a).

4 Rule 38 of the Federal Rules of Appellate Procedure

5 Federal Rules of Civil Procedure, Rule 11 before and after the December 1, 1993 amendment, and Rules 52, 54(d), 81(a)(1).

6 Federal Rules of Bankruptcy Procedure for Adversary Proceedings 7001, 7002, 7008(b), 7052, 7054(b)

7 Federal Rules of Bankruptcy Procedure for Appeals to District Court, 8013, 8014, 8018(b)

8 Federal Rule of Bankruptcy Procedure, 9001(2), 9011.

STATEMENT

I. Background

This matter arose out of claims filed by Morrells against Tasker Generes in the Bankruptcy Estate of Generes, 91 B 17220, on account of a lease dispute. An Adversary Proceeding, 92 A 01283, resulted. However, it did not come on for trial until after the Debtors Plan of Reoganization had been confirmed on the morning of June 30, 1993. The Bankruptcy Court ruled against Generes and in favor of the Morrells and required each side to bear their own costs. The judgment order was a final judgment instead of a recommendation to an Article III judge. Generes filed a motion for a new trial which was denied. Then, Generes appealed.

Although Morrells had filed no motion for sanctions under Bankruptcy Rule 9011, and had prepared the draft of the Final Order requiring both sides to bear their own cost, the Morrells cross-appealed from the failure of the court to *sua sponte* award them costs and attorney's fees. The District Court without oral argument affirmed the Bankruptcy Court on the Appeal of Generes In addition, on defendant's Fed. Rule of Civil Procedure 11 motion, it sanctioned Generes for a frivolous unsubstantiated appeal, but awarded no attorneys fees or untaxed costs.

On the Morrell Cross-appeal, the District Court reversed the Bankruptcy Court for an abuse of discretion. It held since the Bankruptcy Court made an adverse credibility decision on the testimony of Generes, Bankruptcy Rule 9011 required that sanctions must be imposed against Generes. The District Court held that an adverse credibility finding was tantamount to a perjury finding against plaintiff. It remanded to the Bankruptcy Court to determine appropriate fees against Tasker Generes.

Generes filed a timely notice of appeal and Morrell cross-appealed the denial of attorney fees. The Seventh Circuit affirmed the District Court in all respects except the denial of attorney fees.

II. The Generes Appeal to the Seventh Circuit

The Seventh Circuit imposed sanctions for the filing of an appeal which it found to be substantially frivolous notwithstanding that it decided a question of first impression in the Seventh Circuit. On that question, it held that in all civil suits in the Seventh Circuit, as a matter of law, an attorney has no right to make a closing argument. It also held that notwithstanding that the trial court did not have the benefit of oral argument, the trial court's findings still were entitled to the deferential standard on review provided by Bankruptcy Rule 8013. The Seventh Circuit also rejected all other legal issues regarding the law of leases. It found therefore that the appeal was substantially frivolous and sanctions appropriate. Pursuant to Fed. R. App. P. 38, Lynn Downy Dowd, appellate

counsel for Generes, was required to prepare a response to the amount of the sanctions to be imposed. Ms. Dowd retained attorneys, Jerold S. Solvay and Laura A. Kaster, JENNER & BLOCK, to prepare the response before the Seventh Circuit.

On February 21, 1996 the Seventh Circuit imposed sanctions against Generes, personally, in the amount of $19,205.18 in attorneys' and cost under Fed. R. App. P. 38 for a frivolous appeal from the District Court. The Seventh Circuit affirmed sanctions for a frivolous appealt to the District Court for the same reasons. It also affirmed the District Court decision to reverse the Bankruptcy Court decision that each party was to bear its own costs not even discussing the express difference between Bankruptcy Adversary Rule 7054(b) and Fed. R. Civ. P. 54(d). Other Circuit's have held that the difference in language results in no presumption in favor of costs for a prevailing party in bankruptcy. *In re Consolidate Partners Invest. Co.* (Bankr. N.D. Ohio 1993), 156 B.R. 982 and seven other jurisdictions conflict with the district court's reliance on Fed. R. Civ. P. 54(d) as the basis for its costs award[1]. Further Bankruptcy Adversary Rule7008(b)[2] requires a request for fees to be pleaded which it was not.

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[1] 1st Circuit: *In re Roco Corp.* (Bankr. D.R.I. 1984), 37 B.R. 770, 775; *In re Hagan* (Bankr. D.R.I. 1984), 44 B.R. 59, 64; 2d Circuit: *In re Keller* (Bankr. N.D.N.Y. 1989), 125 BR. 716, 719; 3d Circuit: In re Gioioso (3d Cir. 1992), 979 F.2d 956; 8th Circuit: *In re National Marine Sales & Leasing, Inc.* (Bankr. W.D.Mo. 1987), 79 B.R. 442, 460; *In re Robertson* (Bankr. D. Minn. 1989), 105 B.R. 504, 507; 9th Circuit: *In re Aviva Gelato, Inc.* (9th Cir. BAP 1988), 94 B.R. 622, 624, aff'd (9th Cir 1991), 930 F.2d 26; *In re Coast Pacing Material Co.* (Bankr. S.D. Cal. 1989, 109 B.R. 410, 412; 10th Circuit: *In re Grynberg* (10th Cir. 1992), 966 F.2d 570, 573; *In re Investment Bankers, Inc.* (Bankr. D.Colo. 1991), 135 B.R. 659, 670-71; *In re Dunston* (D.Colo. 1992), 146 B.R. 269, 276.

[2] A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint or reply as may be

III. The Morrells' Cross-appeal to the Seventh Circuit of the District Court's denial of additional attorney fee sanctions.

However, the Seventh Circuit reversed the District Court's discretionary 1994 decision to not impose the additional sanction of attorney's fee under Federal Rules of Civil Procedure, Rule 11 as amended effective December 1, 1993. The Seventh Circuit held it would be unjust to apply the new rule because it found that filing of a frivolous appeal occurred shortly before the effective date of the amended rule. It specifically found irrelevant that during most of the appeal and when the District Court made its decision on Morrells' 1994 motion for additional sanctions, the new discretionary rule was applicable. *c.f., Elliott v Tilton*, 64 F.3d 213 (5th Cir.1995), (applying amended rule). The Seventh Circuit then remanded the matter to the District Court to impose appropriate Rule 11 costs and attorneys fees against Tasker Generes in favor of the Morrells.

IV. The Morrells' Cross-appeal to the District Court of the Decision of the Bankruptcy Court.

On the cross-appeal, the District Court reversed the Bankruptcy Court's decision that each party should bear its own costs. The District Court held that the Bankruptcy Court abused its discretion in not awarding attorney's fees to Morrell and requiring both sides to bear their own costs in the Bankruptcy Court.

In the Bankruptcy Court, the Morrells never made a motion for sanctions pursuant to Bankruptcy Rule 9011 or filed a claim for attorney's fees which should preclude any award on appeal or jurisdiction. The attorney for Morrell prepared the draft Final Order for the Court which provided that each side should bear its own costs. The Final Order made no mention of sanctions. The court clearly believed that not even the burden of costs should be awarded against Generes. This implicitly held that Generes was not

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appropriate.

litigating in bad faith in the Bankruptcy Court in the opinion of the Bankruptcy Judge who had observed the entire trial.

Nevertheless, the District Court held that Tasker Generes had committed perjury in testifying during the trial in Bankruptcy Court Adversary Proceeding and remanded the case to the Bankruptcy Court to determine the appropriate amount of fees and costs for litigating in bad faith in the Bankruptcy Court.

The District court did not allow any oral argument before holding that Generes was tantamount to a perjurer, *Matter of Generes*, 165 B.R. 1011, 1021 (N.D.ILL. 1994); *affirmed Matter of Generes*, 69 F.3d 821, 826 (7th Cir. 1995).

The District Court also upheld the decision of the Bankruptcy Court to not allow closing argument by Ronald Sandack of the firm Smith, Williams, and Lodge, attorneys for Generes in the Bankruptcy Court Adversary Case. However, the U.S. Supreme Court has acknowledged that a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument however brief. *Memphis Light. Gas & Water Div. v. Craft* (1978), 436 U.S. 1, 16 n.17 (quoting *Londoner v City of Denver* (1908) 210 U.S. 373. *See also, Molaire v Smith* (S.D. Fla. 1990), 743 F.Supp. 839, 845 (meaningful participation in an alien's exclusion hearing includes, *inter alia*, argument.)

V. The Adversary Proceeding in Bankruptcy Court

The Morrells owned a home at 2324 Clover Lane, Northfield, Illinois, which was partially destroyed by fire on December 15, 1990 when a candle ignited a wreath. Mrs. Morrell testified she was present. The Morrells had had a desire to remodel their home. For this reason Mrs. Morrell testified she had previously arranged with Mr. Sondina a contractor to remodel their home. Hence, Morrells called Mr. Sondina immediately after the fire to commenced the remodeling and repair together. Ms. Sondina testified that he charged Morrells around $150,000 for his work on their house.

The Morrells' insurance company authorized them to lease housing because their house was uninhabitable. Aided by their attorney, the Morrells entered into a written lease with Tasker Generes, which lease had been reviewed and approved by Morrells' attorney and insurance company, for the rental of the home located at 1829 Happ Road, Northbrook Illinois for a six-month period commencing on December 18, 1990 through June 17, 1991, with rent of $2200 payable on the 18th of each month. The lease contained a clause which provided that the time of each payment was of the essence. The lease also contained a holdover provision in the event that the tenants remained in possession beyond the agreement's term.

After delivering their first check for $6600 to Tasker Generes, comprised of the first month's rent and security deposit, the Morrells occupied the premises. All six payments from December 18, 1990 through May 19, 1991 were made on time and delivered to Generes' door by either Ms. Morrell or her children. This was the parties' customary way of delivery of communications. However, the Morrells did not vacate on June 17, 1991, in accordance with the written lease, nor did they pay the rent which would have been due then pursuant to their alleged oral lease.

The Morrells testified that they reached an oral agreement with Generes to extend the lease for two months when construction of their home was to be completed. According to the Morrells, the oral lease stemmed from a phone conversation made by Mr. Morrell to Generes' home at an uncertain date. Judge Morovich found that Morrells' made their alleged oral agreement in the first week of July.

Nonetheless, the Morrells did not pay July rent, due on June 18, 1991, until July 6, 1991, 18 days late. *See. Matter of Generes*, 69 F.3d 821, 825. (7th. Cir. 1995). The written Morrell check confirms that this payment did not occur until after July 1, when Generes testified he elected to leave an unnecessary written notice of hold over tenancy at their house. Generes' trial attorney could not put the legal issues in perpective with the facts adduced at

trial to assist the Court in closing argument because the Court allowed no closing argument to the prejudice of Generes. The failure to pay rent when due is a material breach of a lease in which timely payment is of the essence.

VI. Basis of Jurisdiction below:

This case originated in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division ("The Bankruptcy Court"), docket no. 91 B 17220. On August 14, 1991, Generes, represented by Smith, Williams. & Lodge, filed a petition for relief in the Bankruptcy Court. Thereafter the Morrells filed a timely claim for money allegedly due from Tasker Generes on account of a lease agreement between Tasker Generes and the Morrells. On September 6, 1991 Generes' attorneys on his behalf scheduled the Morrells' claim as disputed and described it as a holdover tenancy. They then commenced the Bankruptcy adversary complaint 92 A 01283 by Tasker Generes disputing the claim and asserting a counterclaim against the Morrells contesting their claim and seeking to recover unpaid rent from Morrells on the holdover tenancy.

In addition to the pleadings filed in this adversary, the brief depositions of Tasker Generes and Ed and Patti Morrell were taken at a mutually convenient time through the cooperation of counsels.

In the underlying Bankruptcy proceeding, Generes's plan of reoganization was confirmed on the morning of June 30, 1996. The Plan essentially was to borrow the money necessary to pay all creditors from Citibank. Immediately on confirmation, Generes closed on the loan from Citibank to implement the plan. With the plan's confirmation, all the assets of the bankrupty estate were transferred thereby back to Generes and the Morrell claim was extinguished by merger into the Plan of Reorganization becoming a contract obligation determinable under state law.

Thereafter, the adversary proceding, 92 A 012383 came on for trial. Because the plan had been confirmed the proceedings were no longer core proceedings.

Nevertheless, the Bankruptcy Court entered a final order sustaining the Morrells' claim, not allowing the Generes counterclaims and ordering each party to bear their own costs on July 15, 1993. On August 16, 1995 the Bankruptcy Court denied a motion for a new trial. A Bankruptcy Court is not an Article III Court and does not have jurisdiction to enter a final order in a non core proceeding on a fundamentally state law issue.

On August 19, 1993, the Clerk of the District court docketed the Notice of appeal to the United States District Court for the Northern District of Illinois, Eastern Division of the plaintiff, Tasker Generes, from a the order of the United States Bankruptcy court for the Northern District of Illinois, there docketed on July 15, 1993, and from the August 16, 1993 denial of plaintiff's motion for a new trial.

. On August 30, 1993, the Morrells cross-appealed the denial of fees and costs although they had never filed a claim in bankruptcy for attorneys fees as required by Bankruptcy Rule 7008(b) or a motion for sanctions or asked that all costs be imposed on Generes .

The United States District Court for the Northern District of Illinois assumed appellate jurisdiction over this matter pursuant to the United States Bankruptcy Code, 11 U.S.C., Rule 8001, 8002 and 28 U.S.C. §158(a).

On November 16, 1993, the District Court entered the Generes opening brief on the docket and on January 5, 1994 his reply brief was entered on the docket. On March 15, 1994, the District Court affirmed the Bankruptcy Court's decision to deny plaintiff closing argument. The District Court reversed the Bankruptcy Court's determination that each party should bear his own costs, and remanded to the Bankruptcy Court for a hearing on the amount of attorneys' fees and costs to be awarded defendants under Bankr.Rule 9011.

On March 24, 1994, Plaintiff, Tasker Generes, filed a timely Notice of Appeal to the Seventh Circuit Court of Appeals from the District Court's memorandum opinion. The Court of

Appeals has jurisdiction to review the District court's memorandum opinion and order and the underlying Bankruptcy final order pursuant to F.R.A.P. 4, 6(b); 28 U.S.C. §158(d); and 28 U.S.C. §1291, if the District Court had jurisdiction and the Bankruptcy Court had jurisdiction to enter a final order.

On April 14, 1994, the District Court taxed costs of $312.95

On April 18, 1994 Morrells filed a petition for Rule 11 attorneys fees and untaxed costs with the District Court for work on their prevailing appeal in the District Court from the Bankruptcy Court. On April 21, 1994 the District Court held a hearing and entered an order which refused to impose monetary sanctions. The Morrells did not file any motion that tolled the time within which to appeal. On May 20, 1994, the Morrells filed a Notice of Appeal to Seventh Circuit Court of Appeals of the denial of the further sanctions for which the Morrells had petitioned the District Court.

On November 3, 1995, the Seventh Circuit affirmed the District Court's decision in all respects except it reversed the District Court's decision that the sanctions already imposed were enough (See, new Rule 11) and remanded the matter to District Court to impose a mandatory sanction under old Federal Rules of Civil Procedure 11. The Seventh Circuit issued notice pursuant to its Rule 38 for further briefing of the issue of sanctions. Because whether there was a friviolous appeal of sanctions and credibility issues is the organic substance of this Court's basic decision, under *Osterneck v. Ernst & whinney, 489 U.S. 169, 174 (1989)*, the Seventh Circuit's issuance of a rule 38 notice is treated as equivalent to a motion on the courts inititive which involves reconsideration of matters properly encompassed in the decision on te merits. This rendered the Court's November 3, 1995 decision interlocutory.

On November 17, 1995, Morrells requested the Seventh Circuit Court of Appeals to tax costs of $226.21 for appeal which were then taxed by the clerk. Briefs were filed per Rule 38. And on February 21, 1996, Morrells were awarded attorneys' fees and

costs in the amount of $19,205.18 on account of the "frivolous" appeal. Generes petition for rehearing was denied on March 21, 1996.

Also, the District Court has not yet determined its sanctions. And, the Bankruptcy Court has awarded $17,100.00 on June 3, 1996 for costs and attorneys fees to Morrells against Tasker Generes. He filed a motion to vacate and amend on May 10, 1996.

This Petition for Writ of Certiorari to the United States Supreme Court was timely filed from the February 21, 1996 sanction decision of the Seventh Circuit Court of Appeals and within ninety days after the March 6, 1996 Petition for Rehearing and Suggestions for Rehearing in Banc was denied on March 21, 1996 by mail in accordance with United States Supreme Court Rules on June 19, 1996.

REASONS FOR GRANTING THE PETITION

I. Introduction

The Seventh Circuit's new decision to impose sanctions for a "substantially" frivolous appeal conflicts with the Third Circuit, which held sanctions may not be imposed unless an appeal is wholly without merit. *Sauers v Commissioner of Internal Revenue*, 771 F.2d 64, 70 n.9 (3d Cir. 1985) *cert denied* 476 U.S. 1162, 90 L. Ed. 2d 727, 106 S.Ct. 2286 (1986) and the same holding in the 1st, 4th, 9th, and 10th Circuits. This decision will substantially chill appellate advocacy in the Seventh Circuit. This is particularly true since even suggesting to the Seventh Circuit that it should alter its decision is a course not without danger. It has been determined by the Seventh Circuit, that additional sanctions may be imposed on a motion to reconsider the imposition of the first sanctions. *Brown v National Board of Medical Examiners*, 800 F.2d 168 (7th Cir. 1986).

The Seventh Circuit has decided that under the United States Constitution, a civil litigant, who has employed an attorney, has no right to have his attorney make a closing argument to the court in a bench trial involving several witnesses providing

conflicting accounts. This substantially devalues all attorney's services in America. Further this decision conflicts with prior Supreme Court precedent and leading State Supreme Court precedent on the right to counsel in a civil bench trial under the U.S. Constitution's Fifth Amendment. In consequence of this decision, what weight on review should be given to a judge's findings of fact which were made without hearing closing argument first to place the facts in the proper perspective in light of the applicable law. The "due regard" language of Bankruptcy Appeal Rule 8013 suggests that where a court's findings of fact are made without closing argument, the review courts must conduct a de nova review rather than review on a clearly erroneous standard.

There is conflict in the Circuits on when to implement new rules of procedures. A search on the term "just w/3 practical" reveals many conflicting decisions. The conflict seems to stem from two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach; the rule that a court must apply the law in effect at the time it renders its decision, especially where the new law is meant to remedy problems in the old law, and the axiom that statutory retroactivity is not favored. The decision in the case at bar fails to apply the proper standard to amended Rule 11 in light of *Landgraf v Usi Fil Products et al* 114 S.Ct. 1433 (1994).

This decision has subverted the American Rule on fee shifting. Judges often are required to decide between conflicting accounts given by witnesses in trials. It has never been the law that an adverse credibility finding was a finding of perjury. Further it has never been the law that a reviewing district court could reverse a trial judge's decision that there was no bad faith conduct warranting the imposition of costs or attorneys fees. After this Seventh Circuit decision, every witness in a trial where credibility is at issue will be placed in tremendous jeopardy. This is a fundamental change in our system of justice made without legislation. The rule has been one of absolute judicial immunity for the trial testimony of a witness to promote the use of courts to settle disputes.

II. Seventh Circuit's Broadened Application of Circuit Rule 38 and New *per se* Frivolous Appeal Rule against Appeals of Any Factual Findings Chills Advocacy and Conflicts with Established Law.

Jerold S. Solovy, of the firm of JENNER & BLOCK, made the following eight points in response to the Seventh Circuit's November 3, 1995 Circuit Rule 38 order and conclusion that "the substance of the appeal is clearly frivolous and sanctions are appropriate." in *Matter of Generes*, 69 F.3d 821, 828 (7th. Cir. 1995).

1. Ms. Dowd had a basis for challenging the ruling of the bankruptcy court because the applicable evidentiary standard required the Morrells' to prove their case by clear and convincing evidence among other legal issues. The Seventh Circuit now holds any challenge to a credibility finding should be consider sanctionable *per se* (*See. Matter of Generes*, 69 F.3d 821, 828 (7th. Cir. 1995). However, litigants such as the appellant who lose at trial have a substantive right to appeal under 28 U.S.C. §1291. Indeed, as the Seventh Circuit has stated in other circumstances, "a 'full and fair opportunity to litigate' includes the right to appeal an adverse decision." *Gray v Lacke*, 885 F.2d 399, 406 (7th Cir. 1989. *cert denied* 494 U.S. 1029 (1990), *quoting Disher v Information Resources, Inc.*, 873 F.2d 136, 139 (7th Cir. 1989). Rule 38 of the Federal Rules of Appellate Procedure was adopted by the Supreme Court pursuant to the Rules Enabling Act, which provides: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Given that lower courts do occasionally err in their factual findings and can be reversed for being "clearly erroneous," the Circuit Court should not deem unsuccessful challenges to credibility determinations frivolous *per se* or sanctionable *per se*. Such a blanket application of Rule 38 is an abridgment of litigants' right to appeal, a result prohibited by the Rules Enabling Act. The appeal brief properly acknowledged the high standard applicable to an appeal on an issue of credibility.

(Appellant's Opening Br. 16-17, 23-24, 34).) Although the appeal was unsuccessful, it is submitted it was not sanctionable.

2. Indeed, the Seventh Circuit had recognized that Rule 38 should not chill litigants from making good faith challenges of credibility determinations (*N.L.R.B. v Lucy Ellen Candy Div.*, 517 F.2d 551, 555 (7th Cir. 1975) (*emphasis added*)):

> A frivolous appeal means something more to us than an unsuccessful appeal. We will grant that law may become so clear and well established that persistence in a course could be determinative of bad faith... We also bear in mind that notwithstanding the overburdened condition in which the courts now find themselves we would not desire to take action which could become the basis of chilling the assertion of rights reasonable held in good faith by virtue of imposing a penalty because of a failure to prevail in the litigation. *Further, while the courts generally uphold the credibility determinations ... of ... triers of fact, such a result is not mandatory and litigants should not be deterred from good faith and reasonable efforts to show the lack of any proper support for a credibility determination.*

The Seventh Circuit has continuously recognized this principle, refusing to sanction litigants who challenge credibility determinations even though the appeal claims are "long shots" and the chance of achieving a reversal of factual findings "slim" because such claim are "not utterly hopeless." *Meredith v Navistar Int'l Transp. Co.*, (35 F.2d 124, 128-29 (7th Cir. 1991). Rather, "[s]anctions are reserved for abusive conduct." *Hagge v Bauer*, 827 F.2d 101, 110 (7th Cir. 1987).

3. Moreover, credibility was not the sole issue presented. The appeal presented an issue of first impression for the Seventh Circuit: whether a Bankruptcy Court's denial of closing argument in a bench trial-adversary proceeding denies a litigant due process of law. In the course of her representation of the appellant, therefore, Ms. Dowd asked the Court to extend the Fifth Amendment's due process protection so as to require that closing arguments be

allowed in such circumstances. (See appellant's Opening Br. 31-34; Reply 7-11.) The appeal brief specifically and accurately stated that this is an issue of first impression with the Court. (Appellant's Opening Br. 31.) Also, Ms. Dowd submitted additional authority to the Court under Circuit Rule 28(j) showing that although an Illinois state appellate court may have decided that closing argument in a civil bench trial is a privilege rather than a right, other states have come to a different conclusion, and that in *Federal Communications Commission v WJR, The Goodwill Station*, 337 U.S. 265, 277 (1949), the United States Supreme court stated that 5th Amendment due process rights to a closing argument should be decided on a case-by-case basis.

4. Given that the appeal briefs straightforwardly presented the issue on closing argument as requiring an extension of the law and as an issue of first impression in the Seventh Circuit, the appeal presented should not have been held to be frivolous, even if the Seventh Circuit believed some of the arguments presented were unpersuasive. *See Rodgers v Wood*, 910 F.2d 444, 449 (7th Cir. 1990) (refusing to impose Rule 38 sanctions even though some arguments presented were clearly meritless because appellant also presented a good faith argument for an extension of the law); *Marquardt v North Am. Car Corp.*, 652 F.2d 714, 716 (7th Cir. 1981) refusing to impose Rule 38 sanctions against party who engaged in delay tactics because its appeal presented an issue of first impression concerning the standard for awarding fees to ERISA defendants), *see also McKnight v General Motors Corp.*, 114 S.Ct. 1826, 1826 (1994) (reversing Rule 38 sanction imposed by the Seventh Circuit because appellant presented arguments on an issue where circuit precedent was clear, but where Supreme Court had not yet spoken definitively on the issue and district courts were divided on the issue). Claims on appeal, even if they challenge factual findings, are not frivolous unless they are "entirely groundless" or contain "'blatant misrepresentations' of the facts or the law." *Meridith v Navistar Int'l Transp. Co.*, 935 F.2d 124, 128-29 (7th Cir. 1991) (citations omitted; *see also Donohoe v*

Consolidated Operating and Prod., 139 F.R.D. 626, 634 (N.D.Ill. 1991)(defining frivolous claims in the Rule 11 context as those that cannot clearly pass the "straight face" test). Sanctions are inappropriate where not all of an appellant's arguments are without substance. *Northwestern Nat'l Ins. Co. v Baltes*, 15 F.3d 660, 664 (7th Cir. 1994); *Weiss v Coca-Cola Bottling.*, 990 F.2d 333, 335 n.2 (7th Cir. 1993). the presentation of appellant's argument for the right to a closing argument may not have persuaded the Seventh Circuit, but it was a non-frivolous substantive argument. Thus, the Seventh Circuit erred in sanctioning appellants for a frivolous appeal.

5. The other arguments presented to the Seventh Circuit were not pure credibility challenges as the Seventh Circuit's opinion suggests. (Op. at 6.) In particular, the appeal briefs made arguments regarding the legal effect of the appellee's admitted failure to pay rent in a timely fashion under Illinois contract law The Morrells paid rent for the two additional months, although the July rent, due June 17, was not paid until July 6. (*See. Goldstein v Lustig*, 154 Ill. App. 3d 595, 507 N.E2d 164, 168 (1987)(a party who breaches a contract cannot take advantage of the terms of the contract which benefit him, nor can he recover damages from the other party to the contract). After reviewing a tape of the argument before the Court, it appears that there was some confusion as to the $100 late payment liquidated damages provision in paragraph 3 of the lease rider. The argument in the appeal briefs was not that appellant was entitled to a $4400 penalty for late rental payment rather than the $100 agreed upon as liquidated damages. Rather, the point was that by failing to make timely rent payments (a fact admitted by appellees), the appellees' defaulted on the lease and were therefore in wrongful possession of the premises, triggering paragraph 8(c) of the lease which created a tenancy at sufferance at a reasonable rate per day. such as $120. because the appellees retained possession of the property after "termination of the term *or otherwise*." (See Exhibit A to Appellate Appendix No. 6, emphasis added.) Significantly, paragraph 8 of

the lease provided that a tenancy at sufferance would arise "if no such written notice is served." (Id.) The appeal briefs argued that appellees' admitted breach of the lease began a contractual tenancy at sufferance pursuant to which the appellees owed appellant a reasonable amount e.g. (61 days at $120 per day) against which the $4400 security deposit should be offset. (Appellant's Opening Br. 17-19.)

6. While the liquidated damages provision in the rider provided that damages caused by late payment would be $100, the provision made clear that this late charge would "in no event constitute a waiver of [Morrells'] default.... nor prevent [Generes] from exercising any of the other rights and remedies" provided by the lease, including the tenancy at sufferance provision of paragraph 8. (Exhibit A to Appellate Appendix No. 6) The appeal brief also contended that as a matter of Illinois law, appellees were estopped from enforcing the provisions of a contract they materially breached. (Appellant's Opening Br. 17.)

7. In addition, the arguments on appeal regarding the bankruptcy court's finding that an oral modification of the lease was created were not intended merely to challenge that court's determination that the appellees' were more credible than appellant, but rather, to show that the bankruptcy court had misapplied the burden of proof for the establishment of an oral modification under Illinois contract law. (See Appellant's Opening Br. 21-22; Reply 9-10) These were substantive, non-frivolous arguments that should not have been sanctionable under Rule 38.

8. The briefs and argument on behalf of appellant, which disclosed all of the standards applicable to the appeal, do not reflect any abusive conduct or the type of bad faith the Seventh Circuit Court has required before imposing sanctions. *See Flaherty v Gas Research Inst.*, 31 F.3d 451, 459 (7th Cir. 1994) (declining to impose Rule 38 sanction for appeal of Rule 11 sanctions and other issues that were not close because there was no indication that the appeal was pursued in bad faith); see also Fed. R. Civ. Proc. 11(b) Advisory Committee Notes (1993)(stating that arguments

specifically identified as arguments for a change of law should be viewed with greater tolerance). Rather, the briefs and arguments demonstrate a good faith effort to present legal issues -- including a matter of first impression for the Seventh Circuit--and sought to show that the court below applied the wrong burden of proof under Illinois law and that oral argument would have allowed appellant to remedy what he believed was an erroneous application of that law to the facts presented. Moreover, Ms. Dowd's agreement to undertake this appeal on a pro bono basis further demonstrates that this appeal was not made in bad faith. In any case, the opprobrium placed upon appellant, as well as Ms. Dowd, by this Court's published opinion is already a sufficient sanction. *See also Unanue-Casal v Unanue-Casal*, 898 F.2d 839, 842 (1st Cir. 1990) (public explanation of behavior itself constituted appropriate sanction under Federal Rule of Civil Procedure 110; *Pony Express Courier v Pony Express Deliver*, 872 F.2d 217, 319 (9th Cir. 1989) (same).

The Seventh Circuit's previous position that "Failure to prevail does not give rise to sanctions" is correct. *Kizer v. Childrens' Learning Center*, 962 F.2d 608, 613 (7th Cir. 1992). *see also D'Aguino v Citicorp/Diners Club, Inc.*, 139 F.R.D. 357(ND Ill. 1991)(holding failure on the merits is not "frivolousness").

There was no frivolous appeal to warrant $19,205.18 in sanctions against Tasker Generes personnally. Since Generes' was represented by an experience appellate attorney, Lynn D. Dowd, whether the appeal was frivolous was a legal determination to be made by her. She advised Generes that this was a meritorous case which should be appealed. She was Chairman of the Appeals Department at Cassiday, Shade, & Gloor. After she left the Cassiday firm for her present firm, she took along this appeal which she had been handling for the Cassiday firm, my former appellate attorneys. All in all, she tells me she has done over 200 appeals. A search on Lexis reveals many cases in which she was appellate counsel. She also teaches at a local law school. It is improper to

penalize the party on an issue of law. See amended Rule 11(c)(2)(A) "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)". The Seventh Circuit applies its Rule 38 in accordance with Rule 11. *Hill v Norfolk & Western Ry.* 814 F.2d 1192, 1200 (7th Cir. 1987) Thus, it is improper to sanction Generes, who was represented by counsel, on the legal issue of whether this was a frivolous appeal. This is particular true in light of the decision to impose no monetary sanction on Lynn D. Dowd.

In addition, the Seventh Circuit did not explain how and why it determined that $19, 205.18 is the minimum amount necessary to deter further frivolous appeals. Because the order was not published the Court could not be aiming this amount as a deterent to others. Amended Rule 11(c)(2) limits a sanction to: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct ..." Such an explaination is a necessary part of any such order so that it may be subject to meaningful review.

III. Seventh Circuit's No Closing Argument Right Holding is Contrary to Supreme Court and Highest State Courts

The Seventh Circuit's decision that in civil suits involving issues of fact closing argument is only a privilege is contrary to this Court's own decision in *Federal Communications Commission v WJR, The Goodwill Station.* 337 U.S. 265, 277 (1949), which held that 5th Amendment due process rights to closing argument in an administrative proceeding must be decided on a case-by-case basis. Moreover, the U.S. Supreme Court has held a "hearing" is the hearing of evidence and argument. "If the one who determines the facts which underlie the order has not considered evidence **or argument**, it is manifest that the hearing has not been given." (emphasis supplied). *Morgan v United States*, 298 U.S. 468, 480; 56 S.Ct. 906, 911; 80 L.Ed. 1288. And, this Court said in *Hovey v Elliot*, 167 U.S. 409, 42L.Ed 215, 220-21, 17 S.Ct 841 (1987):

> Wherever one is assailed in his person or his property, there he may defend for the liability and the right are inseparable. This is a principle of natural justice recognized as such by common intelligence and the conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal.

Implicit in the failure to allow closing argument, is that Bankruptcy Appeal Rule 8013 should not be applied to the findings of the Bankruptcy Court below because the Court refused to allow closing argument. The Seventh Court has now rejected that limitation in favor of a general rule of privilege only.

The Supreme Court of the State of Kansas has held that counsel has an absolute right to closing argument. *Richa v Wichita Precision Tool Company*, 373 P.2d 201, 204-206 (1962), 190 Kan. 138 (1962).

> Our system of jurisprudence is founded on the proposition that every litigant has a right to be heard. The right to be heard carries with it the absolute right to be represented by counsel, and the right of counsel to assist the court by oral argument in analyzing the evidence and applying the law.

The Supreme Court of New Jersey has also held that the right of a party to present analysis of evidence and inferences claimed to be deducible therefrom to trier of facts, whether that tribunal be judge or jury, is subject only to reasonable limitation in exercise of a sound discretion. *Aladdin Oil Burner Corp. v Morton*, 187 A. 350 (N.J.Sup. 1936), 117 N.J.L. 260. The New Jersey Supreme Court held:

> The state of the case exhibits issues of fact; and, in this situation it was error for the judge, at the close of the

> case, to deny the right of summation asserted by appellant. This constituted an arbitrary deprivation of an absolute right, inherent in our system of trial procedure, rather than the exercise of a discretionary authority, reviewable only in the event of abuse-the right, of the very essence of the right of hearing answering her requirements of due process, to present an analysis of the evidence and the inferences claimed to be deducible therefrom to the trier of facts, be that tribunal the judge or a jury. It is, of course, subject to reasonable limitation in the exercise of a sound discretion. ... But limitation necessarily connotes the existence of this primary right. ... That tribunal' findings of fact on conflicting evidence are not reviewable on appeal. The judgement is accordingly reversed, and the record remitted for further proceedings not inconsistent with this opinion; costs to abide the event.

The Supreme Court of North Dakota has held that parties in nonjury civil cases have a right to present final argument. *Fuhrman v Fuhrman*, 354 N.W.2d 97, and examined precedent across the United States. The court quoted from the United States Supreme Court decision in *Herring v New York*, 422 U.S. 853, 863, 95 S.Ct. 2550, 2556, 45 L.Ed.2d 593 601 (1975):

> But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no certain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel. (citation omitted) And, as the same court points out in a footnote, closing argument in a bench trial may be even more important than in a jury trial, since a judge reaches his decision without the "stimulation of opposing viewpoints inherent in the collegial decision-making process of a jury." 422 U.S. at 863, 95 S.Ct. at 2556, 45 L.Ed.2d at 601, fn. 15. While the Supreme Court was speaking in

the context of a criminal trial to the court, we believe the statements we have quoted are equally applicable to civil cases.

Notwithstanding *Korbelik v Stashke*, 232 Ill.App.3d 114, 173 Ill.Dec. 181, 184, 596 N.E.2d 805, 808 (1992), the Illinois Supreme Court has held in *Railway Passengers & Freight Conductors' Mutual Aid & Benefit Association v Robinson* (1893) 147 Ill 138, 159-60, 35 NE 168, 176 that the right to be heard is one dictated by the principles of natural justice. In *West Chicago Park Com'rs. v. Riddle* (1909) 151 Ill App 487, *aff'd* 245 Ill 168, 91 NE 1060, the court stated:

> Our Supreme Court has held that, in legal contemplation, the word 'hearing,' when used in connection with the trial of a lawsuit, includes not only the listening to the examination of the witnesses but the entire judicial examination of the issues, both of law and of fact, between the parties...Consequently the word embraces the listening to the arguments of counsel on both sides if oral arguments are made and the reading of the arguments if written or printed arguments are presented; and, also the consideration of these arguments in respect to both points of law and of fact. A less comprehensive meaning of the term would not give the parties such 'hearing' as they are entitled to under the law.

Because of the division in the views of the courts on the question of the right to a closing argument in a bench trial where fact questions have been raised, this Court should settle the conflict.

In the case at bar, there were issues of fact, which mandated that closing argument be permitted. Had the Seventh Circuit found a due process right to closing argument, it could not have found the appeal frivolous for challenging a factual finding.

Failure to allow closing argument substantially devalues attorneys services and places the judge in the role of both advocate and fact finder.

IV. It is Unjust to Apply Old Rule 11 After Remedial Amendment Without Subject Matter Jurisdiction Even to Impose Rule 11 Sanctions.

The amended Rule 11 effective December 1, 1993 provide the following remedial changes:
1. The issue of Rule 11 sanctions shall be committed to the sound discretion of the court; 2. Alleged offenders shall have a 21-day safe harbor period in which the offending pleading or paper can be withdrawn without imposition of sanctions; 3. The guiding principle in sanctions enforcement is deterrence; courts are encouraged to fashion sanctions "sufficient to deter repetition of such conduct" 4. Normally any monetary penalty should be paid to the court to eliminate the profit motive in sanctions practice. 5. Sanction motions must be stand-alone applications.
The amendments to Rule 11 of the Federal Rules of Civil Procedure went into effect on December 1, 1993. By their terms, they govern "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." 146 F.R.D. 404 (April 22, 1993)(Supreme Court order amending the Federal Rules of Civil Procedure). Several circuits have interpreted the "just and practicable" language broadly, holding that the amendments should be applied to pending case "to the maximum extent possible" so long as that application would not "work injustice." *Burt v Ware*, 14 F.3d 256, 259 (5th Cir. 1994); *see also Professional Programs Group v Department of Commerce*, 29 F.3d 1349 (9th Cir. 1994); *but see Diaz v Shallbetter*, 989 F.2d 850, 853 (7th Cir. 1993) and *Freund v Fleetwood Enterprises, Inc.*, 956 F.2d 354, 363 (1st Cir. 1992). Recently, however, *see Cleveland v Porca Co.*, 28 F.3d 289 (7th Cir. 1994). Also the "just and practicable" language has been construed to place the burden on the party who wants to apply the

old rule to show that it would not be "just and practical" to apply the amendment. *See Wilson v City of Atlantic City*, 142 F.R.D. 603, 605 (D.N.J. 1992)(because "'to the maximum extent possible, the amended rules should be given retroactive application'")(*quoting Skoczylas v Federal Bureau of Prisons*, 961 F.2d 543, 546 (5th Cir. 1992).)

As is a common problem with amended rules, the courts have split on if an old rule should still be applied to a pending decision on a case which was filed when the old rule was in effect. This is a recurring problem as a computer search "just w/3 practicable" will show.

This court has considered when to apply amended statutes recently in *Landgraf v USI Film Products et. al* , 114 S.Ct 1483; 128 L. Ed. 2d 229; 62 U.S.L.W. 4255. "Generally a court is to apply the law in effect at the time it renders its decision." *Bradley v. Richmond School Bd.*. 416 U.S. 696, 711 (1974). Indeed, at common law, statutes that merely removed a burden on private rights by repealing a penal provision (whether criminal or civil). were understood to preclude punishment for acts antedating the repeal. *See United States v Chambers*, 291 U.S. 217, 223-224 (1934). *Cf. DeGurules v INS*, 833 F.2d 861, 862-863 (CA9, 1987). Nevertheless, the circuits have split on Rule 11. The Seventh Circuit decision in *Matter of Generes*, 69 F.3d 821, Bankr. L. Rep. P76,689 (7th Cir. (Ill.), 1995) is contrary to *Knipe v Skinner* 19 F.3d 725 62 USLW 2670, 28 Fed.R.Serv.3d 420 (2nd. Cir. (R.I). 1994)). In *Knipe*, the Second Circuit took cognizance of the rule change and said:

> The amendment is effective December 1, 1993, and "applicable to all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Because Rule 11 sanctions should be imposed with caution, see, e.g. *Rodick*, 1 F.3d at 1351; *Morristown Daily Record v Graphic Comm. Local 8N*, 832 F.2d 31, 32n.1 (3rd. Cir. 1987), we conclude that a just and practicable application of the

amended Rule 11 requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version.

In *Matter of Generes*, the District Court's ruling came in 1994, so the District Court applied the amended rule. However, the 7th Circuit held that the old rule must be applied and remanded the case for the District Court to not apply the new rule but to apply the old rule But, *c.f. Elliott v Tilton*, 64 F.3d 213, 215 (5th Cir. 1995) (applying amended rule). However the Seventh Circuit gave no guidance on whether the measure of appropriate sanctions was to be determined using the measure under the amended rule or the old rule. *LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 436 (SDNY, 1995)(holding appropriate measure of sanctions for conduct found sanctionalble under old rule now governed by amended rule's meaure.) The Seventh Circuit may have failed to realize that this was the rule being applied by the District Court. The commentary to the new rule expressly allows the District Court not to explain a decision not imposing monetary sanctions. Because, rules of procedure are frequently being amended, the Circuit Courts should have a uniform rule for their application.

Nevertheless, the remand to impose old Rule 11 sanctions is in conflict with *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987)(holding District Court in role of Bankruptcy appeal lacks subject matter jurisdiction to impose Rule 11 or Rule 9011 sanctions), *c.f. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (holding that Rule 11 does not apply to appeals). The reason that there is not subject matter jurisdiction is that the Federal Rules of Civil Procedure are made explicitly inapplicable to "proceedings in bankrutpcy...except in so far as they may be made applicable thereto" by the Bankruptcy rules. Fed. R. Civ. P. 81(a)(1). Appeals to district courts in bankruptcy cases are governed by Part VIII of the Bankrukptcy Rules. Bankr. R. 8001-8019. Those rules do not contain any version of Rule 11. Although Part IX of the Bankrutpcy Rules does include a rule that

tracks rule 11 virtually word for word, Bankr. R. 9011, the term "court" as used in Rule 9011 refers to a "bankruptcy court." Bankr. R 9001(2). Hence, Rule 9011 governs only the initial proceeding in bankruptcy court. *In re Kamakani Services*, 125 Bankr. 819, 819-820 (Bankr. D. Hawaii, 1991). Thus the District Court has no subject matter jurisdiction to enter a Rule 11 sanction. This is another reason why the Seventh Circuit erred. Thus the District Court was correct to impose no monetary sanction under Rule 11.

V. Imposition of Sanctions against Witnesses Not Believed By a Judge and Condemning Them as Perjurers Without Indictment Interferes with American Justice.

Generes, the landlord was a witness. He was examined by both his attorney and cross-examined. Judge Coar held that his conclusion depended on which side he believed otherwise the decision could go either way. Judge Coar decided that each side should bear its own costs. He made no finding that Generes had brought the litigation in bad faith. On the contrary, implicit in the order requiring each side to bear its own costs is the finding that Generes did not litigate in bad faith.

The Morrells never made a motion for sanctions against Generes in the Adversary Proceeding nor did they move that costs be imposed against Generes pursuant to Bankruptcy Rule 7054(b). Nor did they file a claim in the Bankruptcy case prior to confirmation of the Plan of Reorganization seeking attorneys fees as required by Bankruptcy Rule 7008(b). Nor did they move the Bankruptcy Court within 180 days to amend the confirmed plan (which had been immediately substantially consummated by obtaining a loan from Citibank prior to the trial of the adversary proceedings) to allow a claim for attorneys fees.

Nevertheless, by way of an cross-appeal to the District Court, Morrells first raised the issue of costs and attorneys fees post-confirmation. Morrells sought attorneys fees which were

barred by the confirmed and substantially consummated Plan of Reorganization.

On the cross-appeal, the District Court concluded that Generes was tantamount to a perjurer in the Bankruptcy Court because the Bankruptcy Judge had not credited his testimony.

The Seventh Circuit reviewing this reversal by the District Court of the Bankruptcy Court, on an abuse of discretion standard, found no error. This Court's rule conflicts with the Fifth Circuit's decision in *Rodrigues-Gutierrez v. INS*, 59 F.3d 504, 507-508 (5th Cir. 1995):

The Fifth circuit, quoting a decison from the Ninth Circuit, held that to assume:

> a witness whose testimony is not accepted by the trier of fact is a perjurer and not a person of good moral character... is not only legally invalid, but is contrary to the basic sense of fairness upon which our legal system is founed. (citation omitted). The BIA incorrectly concluded that Rodriguez was not a person of good moral character, because it erroneously held that a finding that testimony lacks credibility is the equivalent to a finding that the witness has given false testimony.

Thus, the rule is established in the Seventh Circuit the an adverse credibility finding subjects a person to sanctions notwithstanding that the Trial Judge made no finding of bad faith against the party and no trial or indictment was held on the crime of perjury. This is contrary to *Department of Revenue v. Kurth Ranch*, 114 S.Ct. 1937, 1945 (1994) and *Alyeska Pipeline and Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 258-59, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). To use the Court's inherent power in this fashion is manifestly unjust.

The Seventh Circuit cited the following from the District Court's order as the conduct in the Bankruptcy Court to be sanctioned, Matter of Generes, 69 F.3d 821, 826 (7th. Cir. 1995):

> In the instant case, the record reflects that Generes' conduct rivals that of the defendant in Chambers, who not only filed false and frivolous pleadings, but committed perjury and harassed his opponents. Furthermore, Generes used these proceedings as a vehicle for making serious and scandalous allegations which are totally bereft of any basis in fact or law, including claims that the Morrells committed arson and insurance fraud, and objected to his reorganization plan in bad faith. Generes also improperly disclosed the contents of settlement negotiations and accused the trial judge of improper ex parte communications with opposing counsel without any substantiation whatsoever.

Based on this the Seventh Circuit held:

> As the District Court described above, Generes's filings and actions in this matter were characterized by unsubstantiated accusation. Based on the facts of this case as well as the case law applicable theeto, we hold that the district court acted withint its discretion in imposing sanction for Generes's conduct in the Bankruptcy Court.

However, this Court should read the pleadings and the Bankruptcy Court trial transcript. (Appendix B) Look at the Adversary Complaint. it was not false or frivolous. there is no conviction of the crime of perjury for Generes. discovery consisted of one brief deposition of each party. There was no harassment by Smith Williams & Lodge, Generes', attorneys or Generes. Generes was a deposition witness and a trial witness. A witness has absolute judicial immunity for trial testimony. *Scheidler v National Organization for Women, Inc.*, 739 F. Supp. 1210, 1215-17 (ND Ill. 1990). But, Generes does not need immunity for his conduct in the Bankruptcy trial: look at the Bankruptcy Court Adversary

Complaint and Generes' trial testimony. Neither Generes nor his attorneys' Adversary Complaint or trial testimony contain claims that Morrells committed arson and insurance fraud and objected to his reorganization plan in bad faith. Nor did Generes' trial testimony improperly disclose the contents of settlement negotiations nor accuse the trial judge of improper ex parte communications with opposing counsel. Thus, it is improper for a sanction to be imposed for such conduct in the Bankruptcy Court.

Imposing sanctions for non-existent conduct in the Bankruptcy Court is a travesty of justice calling for the Supreme Court to exercise its supervisory authority.

VI. No Core Subject Matter Jurisdiction in The Bankruptcy.

Subject matter jurisdiction cannot be waived and may be challenged by a party or raised sua sponte by the court at any point in the proceedings. *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1055 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

Chapter 11 plan confirmation discharges all claims or merges them into the plan, and removes a debtor's property from the bankrutpcy estate and revests it in the debtor pursuant to Code Section 1141(b) and (c), along with normal ownership rights. *In re NTG Industries*, 118 Bankr. 606 (W.D. Wis. 1986). *In re Crystal Manufacturing*, 60 Bankr. 818, 820 (N.D. Ill., 1986) (bankruptcy court had no subject matter jurisdiction to adjudicate the claim). Jurisdiction in bankruptcy is not forever. It lapses upon confirmation. Otherwise anyone who could trace his claim to a bankrupt could invoke federal jurisdiction to settle disputes. *In re Xonics*, 813 F.2d 127, 131 (7th Cir. 1987). Thus, although the initial pleading were filed before confirmation and discovery was conducted before confirmation and debtor's claim for property damage was voluntarily dismissed prior to confirmation, jurisdiction ceased before trial which occurred after confirmation and substantial consumation by closing on the Citibank loan.. *In re Chicago, Rock Island and Pacific Railroad Co.*, 794 F.2d 1182, 1186 (7th Cir. 1987) ("The court's jurisdiction lapses on plan

confirmation). And confirmation bars claims that could have been made before confirmation.

Although the Plan purports to retain jurisdiction by the Bankruptcy Court to determine any disputed claims (see App. D. Plan p.7). Confirmation merged all claims into the Plan. *In re Au*, 123 Bankr. 31, 33 (Bankr. N.D. Ohio 1990) ("While the court may properly retain jurisdiction over post-confirmation matters under 11 U.S.C. 1142(b) pursuant to a plan provision, it may not expand its jurisdiction merely by asserting it in a reorganization plan."). The objective for bankruptcy is to get it over quickly and start anew.

At most, a post-confirmation adversary proceeding is a non-core proceeding. *In re Lawndale Steel Co., Inc.*, 1991 Bankr. LEXIS 1665. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Article I judges can not hear and issue final orders on rights created by state law). "Adversary" was a state landlord-tenant matter. In non-core proceedings heard pursuant to 28 U.S.C. Section 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. Since a report and recommendation has not been made yet, appellate jurisdiction is nonexistant.

SUMMARY

In summary, the Supreme Court should reverse because the Seventh Circuit's holding chills appellate and trial advocacy. It is contrary to existing Supreme Court precedent, and the Seventh Circuit's own precedent and in conflict with the other Circuits. It unreasonably construes the Rules Enabling Act, and limits an appellant's appeal rights contrary to 28 USC § 1821. And, not the least, erroneously changes underlying risks involved in contract enforcement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tasker O de Generes
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APPENDIX

I. Order on Petition for Rehearing, March 21, 1996.

On consideration of the Tasker Generes Petition for Rehearing and Suggestion for Rehearing in Banc filed March 6, 1996, which the Court construes as a Petition for Rehearing, see L.O.P. 1(a)(2), it is ordered the suggestion is denied.

II. Order on Rule 38 Notice, February 21, 1996.

These matters come before the Court:

1. "DEFENDANTS--APPELLEES-CROSS-APPELLANTS, EDWARD AND PATRICIA MORRELL SUBMISSION ON ATTORNEYS' FEES AND UNTAXABLE COST" filed on November 17, 1995, by counsel;

2. "RESPONSE OF LYNN DOWD, ESQ., TO COURT'S RULE 38 NOTICE" filed on November 20, 1996, by counsel;

3. "PLAINTIFF-APPELLANT TASKER GENERES' RESPONSE TO COURT'S RULE 38 NOTICE" filed November 20, 1995, by counsel;

4. "DEFENDANTS-APPELLEEES-ROSS-APPELLANTS, EDWARD AND PATRICAI MORRELL FURTHER SUBMISSION ON ATTORNEYS' FEES" filed on January 22, 1996, by counsel.

IT IS ORDERED that Edward C. Morrell and Patricia Morrell are awarded $19,205.18 in attorneys' fees and costs under Federal Rule of Appellate Procedure 38. The award is against Tasker Generes, personally.